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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1049

WEATHERFORD OIL TOOL COMPANY, INC., et al,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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NO._____

JESSE E. HALL, SR., et al, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioners, Weatherford Oil Tool Company, Inc., Weatherford Spring Company of Venezuela, Weatherford Internacional, S.A. de C.V., Elmer D. Hall and William R. Hulsy, Administrator of the Estate of Clyde Hall, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 22, 1968 the Petition for Rehearing of which was denied on January 17, 1969.

Opinions Below

The United States District Court for the Northern District of Texas wrote no opinion. The opinion of the court of appeals (App., *infra*, pp. 20-26) has not yet been reported.

Jurisdiction

The judgment of the court of appeals was entered on November 22, 1968 (App., *infra*, p. 27). On January 17, 1969, a Petition for Rehearing was denied (Record, P. 147). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

Question Presented

When a taxpayer gratuitously or fraudulently transfers property to another in Texas, the United States is authorized to proceed against the transferee to collect the taxpayer's *taxes* out of the transferred property. § 6901 of the I. R. C. of 1954. Section 6502 of the I. R. C. of 1954 provides, however, that the United States must institute proceedings for the collection of "taxes" within six years of the date of assessment. Is this a proceeding for the collection of "taxes" and thus subject to § 6502 limitations? This is the sole question presented.

Statutes Involved

(Internal Revenue Code of 1954)

SECTION 6901. TRANSFERRED ASSETS.

(a) Method of Collection.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and

limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, Estate, and Gift Taxes.—

(A) Transferees.—The liability, at law or in equity, of a transferee of property—

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes)

* * *

SECTION 6502. COLLECTION AFTER ASSESSMENT.

(a) Length of Period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

(b) Date When Levy is Considered Made.—The date on which a levy on property or rights to property is

made shall be the date on which the notice of seizure provided in section 6335(a) is given.

The applicable Texas statutes appear in the Appendix at p. 19.

Statement

Petitioners have, over the last twenty-one years, acquired properties which were originally owned by Jesse E. Hall, Sr. ("Jesse") and his wife, Rhoda O. Hall ("Rhoda"). In some cases the properties were acquired directly from Jesse and Rhoda and in other cases from intermediate owners.

Jesse died a pauper on August 3, 1964 owing, together with his wife, Rhoda, income taxes of a substantial amount for which assessments were made on December 11, 1959 and June 3, 1960.

On April 5, 1965, the United States brought this action against Jesse and Rhoda and others with whom Jesse had had business dealings (Record, Pg. 10). Petitioners were not made parties to the original action. That original action had two purposes: (a) to reduce the assessments against Jesse and Rhoda to judgment and (b) to recover from the other Defendants property they had received from Jesse and Rhoda which property, said the United States on "information and belief", was conveyed without consideration and to avoid taxes. Those other Defendants will not be discussed further since they are not parties to this appeal.

A default judgment was taken against Rhoda on August 3, 1966, (Record, Pg. 86) and a summary judgment was entered against Jesse's estate on October 31,

1966 (Record, Pg. 88). Neither of these judgments is final. Rule 54(b), *Fed. Rul. of Civ. Proc.*

On October 31, 1966, the United States filed its Second Amended Complaint adding Petitioners as parties-Defendant *for the first time* (Record, Pg. 35) seeking to apply the properties Petitioners have owned for as long as twenty years (but which at one time were owned by Jesse and Rhoda) to the tax debt of Jesse and Rhoda.

It is of critical importance, as this Court weighs the merits of our Petition, to remember that (1) the United States has no lien on Petitioners' properties and (2) Jesse and Rhoda had no interest of any kind in the properties either when this suit was filed or when the assessments were made. § 6321 of the 1954 Internal Revenue Code provides that a person's unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, *belonging to such* person". § 6322 provides that the lien "shall arise at the time the assessment is made." Whether, at the time of assessment, these taxpayers had any interest in the subject property is to be determined under Texas law. *Aquilino v. United States,* 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed. 2d, 371 (1960). Under the settled law of Texas, as between the parties, the conveyances are unassailable. *Stevens v. Cobern,* 100 Tex. 574, 213 S.W. 925 (Tex. Sup. Ct., 1919); *John Hancock Mutual Life Insurance Co. v. Morse,* 132 Tex. 534, 124 S.W. 2d 330 (Tex. Sup. Ct., 1939); *Chandler v. Welborn,* 156 Tex. 312, 282 S.W. 2d 940 (Tex. Civ. App., 1955), *affirmed,* 294 S.W.2d 801 (Tex. Sup. Ct., 1955). Thus, even if taxpayers did gratuitously or fraudulently convey the subject properties, which we vehemently deny, the properties

were conveyed many years before any assessment and Jesse and Rhoda retained no interest or claim of any kind, under Texas law, to which a government lien could attach.

Thus, this is not a case in which the United States seeks to apply the taxpayers' property to the taxpayers' tax debt but rather one in which the United States seeks to apply the property of third parties to the tax debt of taxpayers.

Whether or not the property transferred to Petitioners by Jesse and Rhoda is liable for the taxes of Jesse and Rhoda depends entirely on state law, *Stern, infra,* which, in this case, does provide a remedy. (Arts. 3996 and 3997, Tex. Civ. Statutes, App., *infra,* p. 19). The United States had two different procedures it could have followed to try to collect the tax liability from these properties:

(1) It could, under § 6901 and § 6902 of the 1954 Internal Revenue Code, have made an assessment against Petitioners just as it would do against an original taxpayer leaving the Petitioners with the option of suing in the Tax Court or in a district court. Mertens, *Law of Federal Income Taxation,* §§ 53.04 and 53.34 (1965).

(2) It could have proceeded against Petitioners, without any assessment whatever against them, under state statutes.

Because the limitations period applicable to an *assessment* against Petitioners (§ 6901(c)) had long ago expired, the United States was left no choice but to follow the second procedure by filing suit against Petitioners, *without any assessment against them,* under Texas creditor's rights statutes.

Petitioners moved for summary judgment on the ground that the action was barred by § 6502 limitations having clearly been brought more than six years after the assessments were made against taxpayers. (Record, p. 106) The motion was denied. (Record, p. 107) However, because a trial on the merits would encompass transactions which occurred over a twenty year period and in several states and countries and thus be lengthy and expensive, the trial court and court of appeals granted permission to take an interlocutory appeal on this important, key issue under the authority of 28 U.S.C. 1292(b). (Record, p. 110 & 113)

The court of appeals held that the action was *not* one to collect a tax but rather an action to collect a judgment which only incidentally happened to be for taxes and thus not subject to the limitations period prescribed by § 6502. The effect of this holding is to leave this action without the ambit of any federal statute of limitations.

If this case is returned to the trial court in its present posture, we will urge, in the trial court, that the Texas four year statute of limitations be applied. We are naturally concerned, however, that the trial court will not apply the Texas statute and thus leave this case without any limitations bar whatever.

Reasons for Granting the Writ

The classification of this action as one other than to collect a tax is incompatable with the decisions of this Court and of the Court of Appeals for the Fourth Circuit. Of course, it is clear that the "assessment" referred to in § 6502 is the assessment against the original taxpayer when none is made against the transferee. *Updike, infra.*

In *United States v. Updike,* 281 U.S. 489, 50 S.Ct. 367, 74 L.Ed 984 (1930), this Court stated:

"It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from § 280 [now § 6901(a)] is to read into that section, and make applicable to the transferee equally with the original taxpayer the provision of § 278(d) [now 6502] in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

. . .

"An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

There have been no statutory changes or further Supreme Court decisions which in any way alter the Court's holding in *Updike*. Indeed, the case has been cited many times for this holding. *Dardy v. United States,* 252 F.2d 670 (9th Cir. 1958); *Payne v. United States,* 247 F.2d 481 (8th Cir. 1957) cert. den. 355 U.S. 923 (1956);

Signal Oil & Gas Corp. v. United States, 125 F.2d 476 (9th Cir. 1942); *United States v. Motsinger,* 123 F.2d 585 (4th Cir. 1941); *Leighton v. United States,* 61 F.2d 530 (9th Cir. 1932) affirmed 289 U.S. 506 (1933); *City National Bank v. Comm.,* 55 F.2d 1073 (5th Cir. 1932) cert. den. 256 U.C. 560 (1932); *Krug v. Comm.,* 30 BTA 1376 (1934), aff'd 78 F.2d 57 (9th Cir. 1935).

Virtually every time the United States has litigated in the teeth of *Updike,* and indeed, in the *Updike* case itself, it has sought to distinguish the nature of its claim—to assert that it was suing not for taxes but for something else.

In *United States v. Motsinger,* 123 F.2d 585 (4th Cir., 1941), the United States sued a fiduciary for taxes owed by the estate he represented. The fiduciary defended on the ground that § 6502 limitations barred the proceeding citing *Updike.* The United States sought to distinguish *Updike* on the basis of the nature of the asserted liability just as the United States is doing in this case. The Fourth Circuit, Judge Parker, rather impatiently observed:

> "To treat the liability of the fiduciary as an entirely new and independent liability and to close one's eyes to the patent fact that it is, in reality, the old tax liability of the original taxpayer which is being enforced against the fiduciary, is to deny to the fiduciary this liberal construction to which he is entitled and to invoke against him the harshest sort of technicality. We are wisely forbidden to give the taxing acts such an interpretation."

Similarly, in *United States v. First Huntington National Bank,* 34 F. Supp. 578 (S.D.W. Va., 1940), aff'd per curiam, 117 F.2d 376 (4th Cir.) the taxpayer sought to distinguish *Updike* on the basis of the nature of the claim asserted by the Government. The Court held:

> "It makes no difference how the liability is created. In either case a tax liability exists, and a suit to collect that liability is obviously a proceeding to collect a tax."

On the other hand, the United States has often insisted that actions of this type are clearly for the purpose of collecting a tax. The United States successfully urged such a position in a case almost exactly like this one, namely *U. S. v. Decker,* 241 F. Supp. 283 (E.D. Penn., 1965). See also *U. S. v. West Texas States Bank,* 357 F.2d 198 (5th Cir., 1966) and *U. S. v. Parker House Sausage Co.,* 344 F.2d 787 (6th Cir., 1965).

This Court has provided considerable guidance in the area of construing § 6502 in its opinion in *Bowers v. New York and Albany Lighterage Co.,* 273 U.S. 346, 47 S.Ct. 389, 71 L.Ed. 676 (1927) dealing with § 250 of the Revenue Act of 1921, a predecessor to § 6502. In that case, this Court said:

> "The purpose of the enactment was to fix a time beyond which *steps to enforce collection* might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit. Under petitioner's [Commissioner] construction taxpayers having no property within reach of the collector would be protected against stale demands, while others would be liable to have their property distrained and sold to pay like claims. The result tends strongly to discredit petitioner's contention."
>
> . . .

"The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. *Eidman v. Martinez,* 184 U.S. 578, 583; *Shwab v. Doyle,* 258 U.S. 529, 536. There has been suggested no principle of public policy or other consideration that furnishes any reasonable support for the setting of a limitation against only one of the two authorized methods of enforcing collection.

"The provision is to be applied in harmony with the intention reasonably to be inferred from its terms and the circumstances of its enactment. Cf. *United States v. Oregon Lumber Co.,* 260 U.S. 290, 299. Prior to the Revenue Act of 1918 there was no limitation against suit to collect income taxes. Section 250(d) of that Act (40 Stat. 1083) required assessment within five years after return, and prohibited the commencement of suit or proceeding to collect such taxes after that period. This bar was held to apply only in respect of taxes for 1918 and later years. Then § 250(d) of the Act of 1921 made the limitation apply against collection of taxes under all the earlier Acts; and, in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors, prescribed the five-year period for determination and assessment of taxes under earlier Acts but allowed only four years as to those for 1921 and succeeding years. The same purpose is shown by the requirement that the commissioner, within one year after request by their personal representatives, shall make assessments on income received by deceased persons. These stricter limitations applicable to taxes for the later period sets no bar against collection by distraint. *A reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made and pressed within five years.*"

. . .

> "The word 'proceedings' is rightly used as descriptive of steps taken for the distraint and sale of property to enforce payment of taxes."
>
> . . .
>
> "It is clear that the meaning of 'proceeding' as used in the clause of limitation in § 250(d), Revenue Act of 1921, cannot be restricted to steps taken in a suit; it includes as well steps taken for the collection of taxes by distraint." (Emphasis added)

In view of *Updike* and *Bowers*, it simply cannot be said that a suit against transferees on a tax judgment is not a suit or a proceeding to collect a tax within the meaning of § 6502 and such a holding would be in direct conflict with the decisions of the Fourth Circuit in *Motsinger* and *First Huntington, supra.*

In reaching its conclusion that this was not a suit for taxes, the court of appeals made several demonstrable errors:

(1) It distinguished *Updike* and other cases on the basis of the nature of the liability established by the laws of the various states in which those cases arose. It must be clearly understood that:

> (a) Before 1926, the United States could enforce its rights as a tax creditor only by bringing a bill in equity of an action at law, depending on state law applicable to private creditors.
>
> (b) § 280 of the Revenue Act of 1926 created a new and *additional* procedure (the predecessor of § 6901) authorizing direct assessments against transferees after which the transferee could sue in Tax Court or in a District Court just as if he were the original taxpayer.

(c) § 6901 is strictly *procedural* and the existence or not of any substantive liability depends entirely on state law. *Comm. v. Stern,* 357 U.S. 39, 78 S.Ct. 1047, 2 L.Ed.2d 1126 (1958).

Obviously, the procedure chosen by the United States to collect the tax could not affect the application of § 6502 limitations. Just as obviously, whether the state theory upon which the liability rests is a trust fund theory, a fraudulent or gratuitous transfer theory or some other theory could not affect the applicability of § 6502 limitations.

(2) The court of appeals emphasized that no personal liability had been asserted against Petitioners and that the action was in rem. The term "transferee" has *never* been limited to persons personally liable for income taxes as such. On the contrary, when income taxes are involved, the liability of a transferee is always limited to the value of the property transferred to him and thus actions against transferees are always in rem. *Phillips v. Comm.,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1930) at pg. 603; *Nader v. Comm.,* 323 F.2d 139 (7th Cir., 1963); *Kohler v. Comm.,* 37 BTA 1019 (1938); *Mertens, supra,* Chap. 53 at page 11 and at page 58. Thus, the in rem nature of this proceeding does not make it any the less an action to collect taxes subject to § 6502 limitations.

(3) The court of appeals suggests that because the United States secured judgments against taxpayers before proceeding against Petitioners as transferees the United States did not bring this action to collect a tax within the meaning of § 6502 but rather to collect judgments which only incidentally happened to be for taxes without the meaning of § 6502. This position is insupportable for several reasons:

(a) The United States brought this action under § 7401 of the Internal Revenue Code of 1954 which section deals exclusively with the "collection and recovery of taxes". (Record, p. 35). And in its petition, the United States prays that Petitioners' property be sold to satisfy the liability of Jesse and Rhoda "for taxes". (Record, p. 55).

(b) This position, if sound, removes this and comparable actions from without the ambit of any federal statute of limitations. This could not be the law and, in any event, would be inconsistent with the opinions of this Court in *Updike* and *Bowers, supra; contra, United States v. Oscar Frammel Bro.,* 50 F.2d 73 (2d Cir., 1931) but see dissent by Judge Hand.

(c) As this Court said in *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 292, 8 S.Ct. 1370, 32 L.Ed. 239 (1887):

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action . . . from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

Again in *Huntington v. Attrill,* 146 U.S. 657, 683, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), this Court said:

> "The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it."

A holding that a suit on a tax judgment is not a suit for taxes is inconsistent with these decisions.

(d) An oft cited basic principle is that limitations provisions be "construed liberally in favor of the taxpayer" *Updike, supra.* See also *Rothensies v. Electric Storage Battery Co.,* 329 U.S. 296, 91 L.Ed. 296, 67 S.Ct. 271 (1946). To hold that a suit on a tax judgment is not a suit for taxes and thus not subject to § 6502 or any other federal limitations would be inconsistent with this principle.

(e) The judgments secured by the United States against Jesse and Rhoda clearly did not affect the *nature* of Petitioners' liability which remained constant under state law as discussed above. If the nature of the liability of Petitioners remained unaffected by the judgments, it would appear to logically follow that applicable limitations would also remain unchanged.

(f) At the time this law suit was filed against Petitioners and at the present time, no enforceable tax judgment exists against Jesse and Rhoda. Rule 54(b) *Fed. Rul. of Civ. Proc.* Thus, if this suit is for taxes or not depending on the existence or not of judgments against Jesse and Rhoda, it must be classified as a suit for taxes.

(g) The effect of such a position is bizarre. If it is correct, after the United States secured a judgment against taxpayers, it could proceed against third parties at any time it chose but, presumably, only so long as the judgment was enforceable against taxpayers. Further, if the position is correct, before such a judgment was secured, no federal limitations provision would bar a suit against third persons until, presumably, such time as a suit against

taxpayers was barred. It must be remembered that the third parties of whom we speak hold properties in which the taxpayers have absolutely no interest. Now, we respectfully suggest that limitations do not run or not against some persons depending on whether or not limitations run against others without specific statutory provisions to that effect. If Congress intended § 6502 limitations to run or not run against a transferee *depending* directly upon whether it ran or did not against his transferor it could have easily said so. Such an approach is not without precedent in the 1954 Code. On the contrary, in § 6901(c)(1), it is specifically provided that limitations does not bar an *assessment* against transferees until a period of time "after the expiration of the period of limitation for assessment against the transferor". Similarly, § 6901(c)(3) specifically provides that an *assessment* against a fiduciary may be made "not later than the expiration of the period for collection of the tax in respect of which such liability arises". The presence of this language in 6901 and the absence of similar language in 6502 cannot be without any significance.

CONCLUSION

Obviously, limitations provisions are of immense importance. If § 6502 does not apply because this is not a suit for taxes, the United States may proceed against transferees in the future at any time it pleases and forever because no other federal limitations provision applies. We submit that Congress never intended an American citizen to bear such a burden.

Petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

(Vernon's Tex. Civ. Stats. Ann.)

ART. 3996. CONVEYANCE TO DEFRAUD

Every gift, conveyance, assignment, or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. Acts 1840, p. 28; P.D. 3876; Acts 1927, 40th Leg., p. 42, ch. 30, § 1.

ART. 3997. VOLUNTARY CONVEYANCE

Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors, unless it appears that such debtor was then possessed of property within this State subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be void as to subsequent creditors or purchasers. Acts 1840, p. 28; P.D. 3876-77.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25427

JESSE E. HALL, SR., ET AL,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(November 22, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

BELL, Circuit Judge: This is an interlocutory appeal under 28 USCA, § 1292(b), from an order denying summary judgment. The focus of the litigation is an effort by the United States to collect taxes from transferees of original taxpayers, the transfers allegedly having been made to defraud the tax collector.

Appellant-transferees sought summary judgment on the ground that no tax had been assessed as to them and that the action was barred by the six-year statute of limitations

imposed by § 6502 of the 1954 Internal Revenue Code. 26 USCA, § 6502. The sole issue presented to us is the validity *vel non* of the denial of this motion for summary judgment. We affirm.

The facts are as follow: unpaid income taxes for the years 1947 and 1948 and 1956 were assessed against Jesse E. Hall, Sr. and his wife, Rhoda O. Hall, on December 11, 1959 and June 3, 1960. On August 3, 1964, Mr. Hall died. On April 6, 1965, the government instituted this action to reduce the Halls' tax liabilities to judgment. On August 3, 1966, the government obtained a default judgment against Rhoda Hall for $487,724. On October 31, 1966, more than six years after assessments against the Halls, the government amended its complaint so as to allege certain fraudulent conveyances of the Halls' property to appellant-transferees and to name the transferees as defendants. This left the pleadings in the posture of a judgment being sought against Mrs. Hall and the Administrator of Mr. Hall and also a judgment setting aside the conveyances alleged to have been fraudulent. On the same day a default judgment was entered against Mrs. Hall in the amount of $1,942,856. On November 21, 1966, a partial summary judgment was entered against the Administrator of Mr. Hall in the amount of $1,941,-841.

The section of the 1954 Internal Revenue Code upon which appellants rely is § 6502(a)(1):

> § 6502 Collection after Assessment
>
> (a) Length of Period - Where the assessment ment of any tax imposed by this title has been made within the period of limitation properly

> applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun
>
> (1) within 6 years after the assessment of the tax . . . .

In considering the position of appellants, it is important to note that the assessments were against the taxpayer-transferors and not against the appellant-transferees. We note also that the transferee provisions of the 1954 Code, 26 USCA §§ 6901-6903 (assessments against transferees), are not involved in the cause of action being asserted here, i.e., in rem action to set aside fraudulent conveyances ancillary to collecting a judgment against taxpayer-transferors. Moreover, in the view we take of the case, we do not reach the second assignment of error; that suit was not instituted against Mr. Hall within six years after the assessment.[1]

The issue is reduced to whether the government may proceed, in an effort to collect its judgment against taxpayers, to set aside conveyances by taxpayers allegedly made to transferees to defraud creditors where no assessment was made against the transferees for the taxes in question within the six year bar of § 6502, supra. The government relies on the Texas fraudulent and voluntary conveyance statutes for its cause of action against the transferees. 12A Texas Civil Statutes, §§ 3996, 3997. Additional relief in the form of the imposition of a lien on the properties and their sale to recover the sums due is also sought.

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[1]This contention rests on the position that Mr. Hall was deceased when the suit was instituted and more than six years had elapsed before his administrator was added as a party defendant. Cf. *United States v. Stone*, 5 Cir., 1958, 257 F.2d 685.

Appellants admit that the government may proceed, without any assessment whatever against the transferees, under the state statutes, supra, which authorize the setting aside of fraudulent or voluntary conveyances.[2] On this appeal from the denial of a motion for summary judgment, the government's pleadings must be viewed as sufficient to set aside the conveyances as fraudulent or voluntary under the Texas law. Thus we proceed to the question, which is, in essence, whether the statute of limitation of § 6502 is applicable to bar a suit against third persons in aid of collecting a judgment against a taxpayer. We hold the § 6502 limitation to be inapplicable.

Appellant-transferees place their principal reliance on *United States v. Updike*, 1930, 281 U.S. 489, 50 S.Ct. 367, 74 L.Ed. 984. There the government instituted proceedings against the stockholders of a dissolved corporation to recover taxes due by the corporation. The stockholders were pursued as transferees under § 280(a) of the 1966 Revenue Act, predecessor to § 6901, supra. The theory of the suit was that the assets of the corporation became trust funds for the use of the United States in satisfaction of the tax liability of the corporation. The assessment against the corporation was seasonable. There was no suit against the corporation. There was no assess-

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[2]Section 3996 deals with conveyances to defraud; § 3997 deals with conveyances made without valuable consideration (voluntary). For a general discussion of tax collection remedies against transferees which are alternative to the 26 USCA, §§ 6901 et seq. route, see Mertens, Law of Federal Income Taxation § 53.04 and § 53.34. Section 7402(a) of the Internal Revenue Code of 1954 has been read as allowing the use of state statutes to set aside fraudulent conveyances in tax collection proceedings. See *United States v. Schofield*, 152 F.Supp. 529 (D.C.E.D. Pa., 1957). Cf. *United States v. West Texas State Bank*, 5 Cir., 1966, 357 F.2d 198.

ment against the stockholders. The suit against the stockholders was filed more than seven years after the assessment against the corporation. The court held that the suit against the stockholders was barred by the six year period of limitation of the predecessor statute to § 6502, § 278(d) of the Revenue Act of 1926. The court viewed the action against the stockholders as an action for the enforcement of tax liability. We are asked to extent this holding to bar an effort to set aside alleged fraudulent or voluntary conveyances in aid of collecting judgments of the United States against the taxpayer-transferors.

The difference in the causes of action is one of the immediate differences between *Updike* and the case before us. In *Updike* the defendant-stockholders were treated as successors to the corporation in the sense of succeeding to the tax liability of the corporation under the transferee statutes. Here the transferees are not being pursued under the transferee statute nor are they being sued under an implied or resulting trust theory as stockholders or successors. The cause of action against them is in the nature of an ancillary proceeding to collect a judgment against others. The ancillary relief sought is against properties allegedly formerly owned by taxpayer-transferors; no in personam relief is claimed against the transferees.

The cases applying the *Updike* principle demonstrate like factual circumstances from two standpoints. First, there was no timely suit against taxpayer-transferors; stated differently, in each the first effort at collection by suit was against the transferee. Second, in each case the suit was for the taxes due as against an indirect or ancillary effort, as here, to collect a judgment for taxes due against a transferor. See *United States v. Motsinger*, 4 Cir., 1941, 123 F.2d 585; *United States v. Weisburn*,

E.D.Pa., 1943, 48 F.Supp. 393; *United States v. First Huntington National Bank,* S.D. W-Va., 1940, 34 F. Supp. 573, aff., 4 Cir., 1941, 117 F.2d 376. The rationale of each of these cases is that the suit was a proceeding against a transferee on a trust fund theory within the contemplation of § 6502, supra, to collect taxes due. It matters not whether the suit be under the transferee statutes, § 6901, et seq., or alternatively, as a direct suit without assessment.

The opposite situation is presented where the proceeding is not to collect a tax as such but against a third person to collect a judgment against a taxpayer-transferor. In *United States v. Oscar Fromnel Bro.,* 2 Cir., 1931, 50 F.2d 73, transferee-stockholders were held liable under the trust fund theory on a judgment for taxes previously obtained against a corporation. The suit was in pursuit of the assets transferred to the stockholders. The bar of the statute of limitation of a predecessor statute to § 6502 was held inapplicable, L. Hand, Circuit Judge, dissenting on the basis of *Updike.*

These cases point up two situations. One is a suit to collect a tax from a third party successor to assets of a taxpayer. The successor may be such by operation of law as in the case of stockholders or as a fiduciary under a trust principle. The other is a suit against a transferee under conveyances made to defraud the United States as a judgment creditor. The latter type suit is in aid of collecting a judgment against transferor-taxpayer for taxes due. We think there is a difference in logic and law between the two. Admittedly the difference lies in one being called a suit to collect taxes, as in the first, and in the other being called a suit to follow assets, fraudulently

acquired, in order to collect a judgment against the taxpayer. We perceive these situations to be distinguishable; one, the first, is barred by § 6502 as construed in *Updike;* the other is outside the ambit of § 6502.

Here the United States has judgments against the taxpayer, transferors; its suit against the appellant-transferees was ancillary and is limited to collecting the judgments, once they were obtained.

The District Court did not err in rejecting § 6502 as a bar under the circumstances.

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term 1968

No. 25427

D.C. Docket No. CA4-436

JESSE E. HALL, SR., ET AL,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Jesse E. Hall, Sr., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 22, 1968

Issued as Mandate:

[25] - Bell

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25427

JESSE E. HALL, SR., ET AL,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

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Filed

(January 17, 1969)

(On Petition for Rehearing)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

BY THE COURT:-

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.